

1 mere existence of a debtor-creditor relationship does not create a fiduciary duty. Only where a
 2 "special relationship" exists between a creditor and debtor might a court find a fiduciary duty
 3 which is premised on that special relationship, not on the creditor-debtor relationship. *See*,
 4 Simmons Oil Corporation v. Holly Corporation, 258 Mont. 79, 84, 852 P. 2d 523, 526 (1993);
 5 Diest v. Wachholz, 208 Mont. 207, 216, 678 P.2d 188, 193 (1984). Magten has not, nor can it,
 6 allege any "special relationship" between itself and Clark Fork or NorthWestern. Thus, there is
 7 no fiduciary duty between Magten and either Clark Fork or NorthWestern, and, *a fortiori*, there is
 8 no fiduciary duty owed by the "officers" of Clark Fork to Magten.

9 **III. The Terms of the Relevant Documents on which Magten Bases**
 10 **Its Claim Expressly Permitted the Transfer of the Assets and**
 11 **Liabilities at Issue Here from the Limited Liability Company**
 12 **to NorthWestern.**

13 As Magten makes clear in its Complaint, it premises the alleged liability of the named
 14 Defendants for a breach of fiduciary duty upon the terms of the QUIPS Trust Documents
 15 originally created in 1996 when MPC issued the Junior Debentures and the Trust issued the
 16 QUIPS.⁴ After MPC created the Trust in 1996, MPC, the Trust, and Bank of New York (the
 17 original trustee) entered into the Indenture For Unsecured Subordinate Debt Securities dated as
 18 of November 1, 1996 relating to Trust Securities (the "Indenture").⁵ The Indenture expressly
 19 states that a transfer of assets conducted in accordance with section 1101 of the Indenture has the
 20 affect of releasing the predecessor entity of all obligations under the Indenture or any
 21 Outstanding Securities thereunder. *See* Indenture, Sec. 1101-1102. The Indenture controls the
 22 rights of Magten and Magten should not be allowed to object to acts that were performed in
 23 accordance with the terms of the Indenture. *cf. In re Holiday Mart, Inc.*, 715 F.2d 430, 432 (9th

24 ⁴ As explained *infra*, these documents have subsequently been amended in accordance with the terms of those documents

⁵ A complete copy of the Indenture is attached as Exhibit A.

1 Cir. 1983) (recognizing that valid subordination agreements are normally enforced in accordance
2 with their terms). Since the transfers of the Montana Utility Assets and Liabilities complied with
3 Section 1101 of the Indenture and released the predecessor entities under Section 1102, Magten
4 should not be heard to say that anyone violated any alleged duty when the transaction at issue
5 was completed in accordance with the rights granted under the Indenture.

6 The Indenture allows property of the original entity to be transferred to "a Person
7 organized and validly existing under the laws of the United States, any State thereof, or any other
8 jurisdiction." See Indenture, Sec. 1101. The only other requirements in Section 1101 of the
9 Indenture are that, immediately after the transaction, no Event of Default "shall have occurred
10 and be continuing" and that the Trustee receive an "Officer's Certificate and an Opinion of
11 Counsel, each stating all of the conditions for the transfer have been met." See Indenture, Sec.
12 1101(b)-(c). Magten has not alleged noncompliance with either of these remaining requirements.
13 Conspicuously absent from the Indenture is any requirement of approval by the Indenture
14 Trustee or a holder of an interest in the Indenture Trust prior to a transfer. See Indenture, Sec.
15 1101. Therefore, the transfer complained of here complied with section 1101, and the transfer
16 was thus valid under the varying agreements upon which Magten references in its Complaint.

17 Further, the Second Supplemental Indenture and the Amendment to Guarantee
18 Agreement⁶, executed by the Trustee, NorthWestern and Clark Fork,⁷ expressly reserve the right
19 of Clark Fork to transfer substantially all of its assets to NorthWestern. The Second
20 Supplemental Indenture clearly preserves the right of Clark Fork to transfer substantially all of
21 its assets to another entity and clarifies that this right includes the right of Clark Fort to transfer
22

23 ⁶ The Guarantee Agreement and Amendment to Guarantee Agreement are attached as Exhibits B and C
24 respectively.

⁷ The Second Supplemental Indenture and Amendment to Guarantee Agreement were entered into on or about
August 13, 2002. A complete copy of the Second Supplemental Indenture is attached as Exhibit D.

1 substantially all of its assets to NorthWestern. *See* Second Supplemental Indenture Section 201.
2 The language is also clear that such a transfer to NorthWestern would relieve Clark Fork of "its
3 obligations under the QUIPS Debenture, the Indenture and hereunder as provided in Article
4 Eleven of the Indenture." *See* Second Supplemental Indenture, Section 201.

5 At the same time that the Second Supplemental Indenture was executed, the Trustee,
6 NorthWestern, and Clark Fork also executed an Amendment to Guarantee Agreement. The
7 Amendment to Guarantee Agreement contains language similar to the Second Supplemental
8 Indenture; it reserves the right of Clark Fork to transfer substantially all of its assets to another
9 entity, and clarifies that this right includes the right of Clark Fork to transfer substantially all of
10 its assets to NorthWestern. *See* Amendment to Guarantee Agreement, section 201. The section
11 also makes clear that such a transfer can be accomplished in compliance with the Indenture. *See*
12 Amendment to Guarantee Agreement, section 201.

13 These documents, executed by the Trustee, further confirm that a transfer of the Montana
14 Utility Assets and Liabilities from Clark Fork to NorthWestern, in compliance with the
15 Indenture, was permissible. The transfer of the Montana Utility Assets and Liabilities by Clark
16 Fork to NorthWestern was allowed by the Indenture and confirmed in later documents executed
17 by the Trustee; the transfers were within the rights granted to Clark Fork and NorthWestern by
18 the Indenture and these other documents. Magten, therefore, can not now complain because
19 NorthWestern and Clark Fork exercised their rights under documents approved by the Trustee of
20 the QUIPS. Nor may Magten hold the "officers" of the limited liability company liable for a
21 transfer of assets and liabilities permitted by those governing documents and approved by the
22 Trustee.

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1 **CONCLUSION**

2 As a matter of law, only NorthWestern, as the sole Member and Manager of Clark Fork,
3 had the legal authority to transfer the Montana Utility Assets and Liabilities from its wholly
4 owned subsidiary to itself. As a matter of law, the Defendants here were neither the Members
5 nor the Managers of Clark Fork, and thus lacked the legal capacity to effectuate such transfer,
6 and thus may not be held liable for the decisions or acts of the Members or Managers of Clark
7 Fork.

8 Further, as a matter of law, the Defendants here owed no fiduciary duty to Magten, a
9 general creditor of the limited liability company. As a matter of law, the only duties owed were
10 the duties of loyalty and care, which duties were owed by the members and managers (here
11 NorthWestern) to the limited liability company (here Clark Fork) and the members (here
12 NorthWestern).

13 Finally, as a matter of law, NorthWestern was within its legal rights to transfer the
14 Montana Utility Assets and Liabilities from its wholly owned subsidiary, Clark Fork, to itself
15 pursuant to the terms and conditions of the QUIPS Trust Documents, and Magten has no standing
16 to complain about such legal and valid transfer, and thus, Defendants may not be held liable for
17 the legal and authorized actions of the Members or Managers of Clark Fork.

18 For these reasons, as a matter of law, Magten's Complaint must be dismissed with
19 prejudice.

20 Dated this 9th day of July, 2004.

21 BROWNING, KALECZYC, BERRY & HOVEN, P.C.

22
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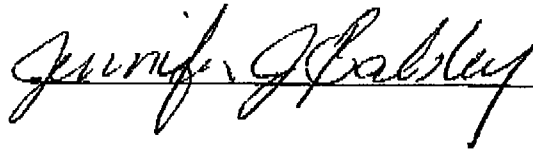
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2004, a true and correct copy of the foregoing was mailed by first-class mail, postage prepaid, addressed to:

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EXHIBIT G

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